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Utah Supreme Court

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BEFORE THE UTAH SUPREME COURT

SEAN KENDALL,

Plaintiff/Appellant,

v.

BRETT OLSEN, LT. BRIAN PURVIS,
JOSEPH ALLEN EVERETT, TOM
EDMUNDSON, GEORGE S. PREGMAN,
and SALT LAKE CITY CORPORATION,

Defendants/Appellees.

Appeal No. 2015-0927-SC

On Appeal from the
Third Judicial District Court
District Court Case No. 150900558

SUPPLEMENTAL BRIEF OF APPELLEES

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INTRODUCTION

Kendall filed this appeal to challenge the constitutionality of Utah Code § 78B-3-104 (the “bond statute”) and Utah Code § 63G-7-601 (the “undertaking statute”), which require the filing of a bond and an undertaking when bringing an action against a police officer or a government entity. The issues were fully briefed by the parties in their briefs to the Court of Appeals, including the fact that this appeal is moot and that Kendall does not have standing to challenge the statutes. The recall of this case by the Supreme Court has not remedied these deficiencies and the Court should dismiss the appeal. To the extent the Court does consider the merits of this appeal, this Court should be guided by its prior decisions in *Zamora v. Draper*, 635 P.2d 78 (Utah 1981) and *Snyder v. Cook*, 688 P.2d 496 (Utah 1984) that find the bond statute Kendall challenges in this action is constitutional on its face. The conclusion this Court reached in *Zamora* and *Snyder* that the bond statute is constitutional as applied in usual and ordinary circumstances is correct. The bond statute does not violate the open courts provision because it does not abrogate or impermissibly restrict access to the courts. Likewise, the bond statute does not violate due process because it is reasonably related to a proper legislative purpose and it satisfies the notice and hearing requirements of a procedural due process analysis. Kendall has not shown otherwise.

Similarly, Kendall has not shown that the Court’s decisions in *Zamora* and *Snyder* are no longer sound because of changing conditions. The bond statute was passed in recognition of the unique role of police officers in our society and the reality that this role exposes them to a greater risk of frivolous lawsuits. This unique role of a police officer

has not changed since this statute was first passed and there is nothing to indicate that officers are subject to fewer frivolous actions now than they were seventy years ago. The bond and undertaking statutes do not violate constitutional rights and this Court should not depart from the conclusion it reached in *Zamora* and *Snyder* that the bond statute does not violate constitutional rights on its face.

ARGUMENT

I. THIS APPEAL IS MOOT AND KENDALL LACKS STANDING TO CHALLENGE THE STATUTES AT ISSUE.

The recall of this case by the Supreme Court does not create a “material difference” in the arguments presented to the Court. This Court’s Order on Supplemental Briefing states a supplemental brief should only be submitted “if the posture before the Supreme Court creates a material difference in the argument presented” As discussed at length in the City Defendants’¹ Appellee Brief, the Court should decline to rule on the merits of this appeal because the issues raised are moot. *See* Appellee Br. at 12-14. Kendall also does not have standing to challenge the constitutionality of the statutes. The Supreme Court’s recall of this case does not remedy these deficiencies and the appeal should be dismissed.

II. THE PRINCIPLES OF STARE DECISIS SHOW THE HOLDING IN *ZAMORA* SHOULD BE FOLLOWED.

To the extent the Court elects to consider the merits of this appeal, the Court should

¹ Defendants/Appellees Brett Olsen, Brian Purvis, Joseph Allen Everett, Tom Edmundson, George Pregman, and Salt Lake City Corporation are referred to collectively as the City Defendants.

not depart from the conclusion it reached in its prior decisions that the bond statute does not violate constitutional rights on its face. “Stare decisis is ‘a cornerstone of Anglo-American jurisprudence.’” *Bank of Am. v. Adamson*, 2017 UT 2, ¶¶ 9-10, No. 20140861, 2017 WL 117356, at * 2 (Utah 2017)(quoting *State v. Guard*, 2015 UT 96, ¶ 33, 371 P.3d 1). “Any party asking a court to overturn prior precedent has a substantial burden of persuasion.” *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, ¶ 23, 245 P.3d 184 (quotation marks omitted). Thus, “[a] court will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.” *Id.* (citations and quotation marks omitted).

In *Zamora* this Court concluded the bond statute is constitutional as applied in usual and ordinary circumstances. It recognized that the statute could operate to restrict access to the courts if applied to an individual that is impecunious, but found the statute constitutional because the language of the statute permits district courts flexibility in setting the amount of the bond to ensure individuals that are impecunious are not denied access to the courts. The Court affirmed its holding in *Synder*. The conclusion the Court reached is correct and Kendall has not shown that changing conditions warrant a departure from that conclusion.

A. The Conclusion the Court Reached in *Zamora* is Correct.

1. Zamora was Correctly Decided because the Statute does not Abrogate a Legal Remedy.

The conclusion the Court reached in *Zamora* is correct because the bond statute does

not eliminate a legal remedy. A necessary pre-requisite to every open courts challenge is that the statute at issue abrogate a legal remedy. See e.g., *Tindley, et al. v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 12-26, 116 P.3d 295.² A statute abrogates a legal remedy if it “annul[s], cancel[s], repeal[s] or destroy[s]” a right to recovery. *Burgandy v. State Dep’t of Human Serv.*, 1999 UT App 208, ¶ 16, 983 P.2d 586 (citing *Black’s Law Dictionary* 8 (5th ed.1979), for its definition of “abrogate” and finding statute at issue did not violate open courts provision because it did not abrogate a claim). If no claim is abrogated, no violation of the open courts provision can be shown. *Tindley*, 2005 UT 30, ¶ 12-26 (finding statute did not violate open courts provision because it did not abrogate a claim). The bond statute at issue in *Zamora* and this case is an attorney’s fees provision that imposes a bond requirement to ensure collection of fees and costs, if awarded. It does not eliminate a legal remedy and, thus, does not violate the open courts provision.³

This conclusion is consistent with other decisions of this Court that find similar statutes do not violate the open courts provision on their face. For example, in *Jensen v. State Tax Comm’n*, 835 P.2d 965, 969 (Utah 1992), this Court considered a challenge to a statute that required taxpayers to deposit the full amount of assessed taxes, penalties, and

² See also, *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 15, 67 P.3d 436 (stating “the *Berry* test begins with the presumption that a legal remedy was abolished”).

³ The fact *Zamora* was decided before the landmark decision in *Berry*, which sets forth the two-part test used to determine if a statute that abrogates a claim survives constitutional muster does not affect the correctness of the Court’s conclusion. Courts only engage in a *Berry* analysis if the statute abrogates a claim. *Burgandy v. State Dep’t of Human Serv.*, 1999 UT App 208, ¶ 16, 983 P.2d 586 (stating *Berry* established a two-part test for analyzing open courts questions, but the “test applies only when a right is abrogated”); *Wood*, 2002 UT 134, ¶ 15 (stating “the *Berry* test begins with the presumption that a legal remedy was abolished”).

interest with the Tax Commission before seeking appellate review. The Court found that the statute was constitutional on its face, but it could operate to bar access to courts as applied to the facts of a particular case. *Id.* In that case, the appellants had failed to deposit the \$340,000 they were deemed to owe in taxes, penalties and past due interest before bringing their appeal challenging that determination. *Id.* at 968-69. The Court excused the appellants from compliance with the statutory deposit requirement because the appellants did not have the funds and it would have been unconstitutional to impose the deposit requirement in that case. *Id.* at 969. However, the Court made clear that the statute was not unconstitutional on its face and that if a taxpayer could meet the deposit requirement, they were required to do so. *Id.* (stating “the statutory requirement is not unconstitutional in all cases. When a taxpayer is able to meet the requirement, the deposit must be paid”).

Like the Court in *Jensen*, the Court in *Zamora* found the bond statute constitutional on its face, but that it could operate to prevent access to the courts if applied to an individual that was unable to afford the bond. *Zamora*, 635 P.2d at 80. The Court found that this concern is resolved by the fact that courts have the ability to conduct preliminary procedures to determine whether a plaintiff is impecunious and able to afford the bond and the language of the statute contemplates such flexibility. *Id.* at 80-81. The Court’s conclusion is consistent with several canons of statutory construction. For example, statutes should be read in harmony and not in conflict with other relevant statutory provisions.⁴ In *Zamora*, the Court read the language of the bond statute in conjunction

⁴ *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (“We read the plain language of the statute as a whole, and interpret its provisions in harmony with other

with other statutory provisions that give courts the ability to hold preliminary procedures to determine if a plaintiff is impecunious and can afford a statutorily imposed fee. *Id.* at 80-82. The Court's conclusion is also consistent with the principles of statutory construction that direct courts to interpret statutes to avoid absurd results⁵ and to presume statutes are constitutional and to resolve any doubts in favor of constitutionality.⁶

Finally, the Court may disregard the claim that the bond statute is unconstitutional on its face because it discourages people that are not impecunious from bringing claims

statutes in the same chapter and related chapters.”); *Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147, 1150 (“[O]ur plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole. Moreover, the purpose of the statute has an influence on the plain meaning of a statute.”) (internal citations and quotation marks omitted).

⁵ *State ex rel. Z.C.*, 2007 UT 54, ¶ 11, 165 P.3d 1206 (stating a “well-settled caveat to the plain meaning rule states that a court should not follow the literal language of a statute if its plain meaning works an absurd result”) (citations and quotation marks omitted); *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 70 n.23, 267 P.3d 863, 879 n.23 (“When statutory language . . . presents the court with two alternative readings, we prefer the reading that avoids absurd results.”) (citation and quotation marks omitted).

⁶ *Tindley*, 2005 UT 30, ¶ 11 (stating “the challenged statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality”); *State v. Angilau*, 2011 UT 3, ¶ 7, 245 P.3d 745 (stating the Court is “guided by the well-settled proposition that all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity”).

Kendall’s contention that this principle of statutory construction does not apply when a party challenges a statute under the open courts provision is incorrect. The authority Kendall relies on has been superseded by more recent majority decisions of this Court. *See e.g., Tindley*, 2005 UT 30, ¶ 11 (stating in the context of an open courts challenge that the statute “is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality”); *Judd v. Drezga*, 2004 UT 91, ¶ 11, 103 P.3d 135 (where the majority recognized “an obligation of deference to legislative judgments in a *Berry* review” and stated that “to the extent this differs from our prior application of *Berry*, those prior applications are disavowed”); *Id.* ¶ 42 (C.J. Durham dissenting) (noting the majority afforded a presumption of validity to the statute in considering the appellant’s open courts challenge, disavowing the holding in *Wood* that Kendall relies on).

because of the financial risks involved.⁷ This does not show an elimination of a legal remedy. There are financial risks and obligations associated with engaging in any litigation, including costs of discovery, expert fees, and payment of an attorney to pursue the claim. In some cases these financial risks and obligations also include a statutory or contractual award of attorney fees to the prevailing party⁸ and in all cases they include an award of costs to the prevailing party.⁹ Whenever a person decides to pursue a legal claim they necessarily assume these financial obligations. The fact that pursuing litigation necessarily requires the expenditure of funds and the risk of an adverse judgment does not

⁷ See Kendall's Suppl. Br., at 6-7 & 10.

⁸ See e.g., Utah Code § 63G-20-204 (awarding attorney's fees to prevailing party in an action brought against government entity relating to the provisions of the Religious Protections in Relation to Marriage, Family, or Sexuality Act); Utah Code § 11-39-106 (awarding attorneys' fees to the prevailing party in an action brought against a local entity to enforce the provision of the Act on Building Improvements and Public Works Projects); Utah Code § 78B-5-826 (awarding costs and attorneys' fees to prevailing party when the provisions of a promissory note, written contract, or other writing allow at least one party to recover attorneys' fees); Utah Code § 78b-11-126 (awarding attorneys' fees to the prevailing party in an action brought under Utah Uniform Arbitration Act); Utah Code § 30-3-3 (stating "court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action" in actions to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case); Utah Code § 57-16-8 (awarding attorneys' fees to the prevailing party in eviction proceedings brought under the Mobile Home Park Residency Act); 28 U.S.C. § 1988 (permitting award of attorneys' fees to the prevailing party in an action brought pursuant to 28 U.S.C. § 1983); *Thorpe v. Ansell*, 367 F. App'x 914, 924 (10th Cir. 2010) (affirming the lower court's award of attorneys' fees to police officers in § 1983 case); *United States v. Hyundai Merch. Marine Co.*, 172 F.3d 1187, 1192 (9th Cir. 1999) (applying the Oil Pollution Act to permit the government to recover attorneys' fees); *United States v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998) (interpreting CERCLA to permit the government, as the prevailing party, to recover attorneys' fees).

⁹ UTAH RULE CIV. P. 54(d)(1) (awarding costs other than attorney's fees to prevailing party, unless a rule or statute specifically provides otherwise); FED. R. CIV. P. 54(d)(1) (awarding costs to the prevailing party on the same grounds as the state rule)

show an abrogation of a legal remedy.¹⁰ Kendall has not shown the Court's holding in *Zamora* was clearly erroneous¹¹ and the Court should not depart from the conclusion it reached in that case that the bond statute is constitutional and does not violate the open courts clause on its face.

2. *Zamora* was Correctly Decided because the Bond Statute does not Violate Due Process.

Kendall argues *Zamora* was incorrectly decided because it does not discuss whether the statute violates due process. This argument is not compelling. The *Zamora* decision does not contain any specific discussion of whether the bond statute violates due process because the plaintiff did not challenge the statute on those grounds.¹² But this does not show that the conclusion the Court reached in *Zamora* is wrong. As set forth at length in the City Defendants' Appellee Brief, neither the bond nor the undertaking statute violate

¹⁰ Kendall's citation to choice quotes from fact witnesses he called at an evidentiary hearing set to determine if he was impecunious and required to pay a bond does not show the bond or undertaking statutes abrogate a claim. See Kendall's Suppl. Br., at 6, n.6. Whether a statute abrogates a claim is a question of law. See, e.g., *Tindley*, 2005 UT 30, ¶¶12-26; *Wood*, 2002 UT 134, ¶¶9-15. It is the role of this Court, not fact witnesses at an evidentiary hearing, to resolve that question.

¹¹ *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (citing *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Before overturning a long-settled precedent, however, we require 'special justification,' not just an argument that the precedent was wrongly decided."); *Bank of Am*, 2017 WL 117356, at *2-3 (declining to depart from prior precedent where plaintiff did not mention the applicable standard, and failed to offer an arguments to explain why the Court's decision was either originally erroneous or no longer sound); *ASC Utah*, 2010 UT 65, ¶ 24 (recognizing the plaintiff was not alleging the Court's decision was "no longer sound because of changing conditions, but "simply that the rule was originally wrong and should be abandoned" and finding the plaintiff did not satisfy his burden of persuasion).

¹² Notably, the decision in *Zamora* is instructive to the due process analysis because it identifies the purpose of the bond statute and shows that it is rationally related to a legitimate legislative purpose.

due process because the statutes are reasonably related to a proper legislative purpose¹³ and they satisfy the notice and hearing requirements of a procedural due process analysis. Rather than repeat arguments on issues that have been fully briefed, the City Defendants refer the Court to their Appellee Brief for further discussion on this point.

B. Kendall has not Shown Changing Conditions Warrant a Departure from this Court's Holding in *Zamora*.

Kendall has not shown that this Court's holding in *Zamora* that the bond statute is constitutional is no longer sound because of changing conditions. The bond statute was first passed in 1951. *See* 1951 Ch. 58, § 1, enacting Utah Code § 104-11-16 (1951) (first version of the bond statute). As set forth in *Zamora*, the statute was passed in recognition of the unique role of police officers in our society and the reality that this role exposes them to a greater risk of frivolous lawsuits:

[P]eace officers are in an especially hazardous calling rendering a service essential to public safety and welfare. While it is the privilege of most of us to steer clear of situations where there is violence and danger, it is the sworn duty of peace officers to go into such situations. Without extenuating thereon, this exposes them to the possibility of becoming involved therein and of incurring animosities of those engaged in such troubles, with the consequent risks of lawsuits which may emanate therefrom.

Because of what has just been said, we see nothing inherently unreasonable

¹³ Kendall argues heightened scrutiny applies to the substantive due process claim in this case. Kendall failed to timely include arguments on this point in his briefing to the Utah Court of Appeals. *See* City Defendants' Appellee Br., at 28, n.3. This Court's Order on Supplemental Briefing makes clear that supplemental briefing may not be used to remedy deficiencies in prior briefing. Suppl. Briefing Order ("[T]his order shall not be construed to excuse compliance with otherwise-applicable principles or rules of appellate review, (e.g. preservation in the trial court).") Regardless, Kendall's assertion that a heightened standard of review applies is incorrect. As set forth in a recent decision by this Court, a rational basis standard of review applies in a case like this where no claim is abrogated. *See* City Defendants' Appellee Br. at 28 *citing* *Tindley*, 2005 UT 30, ¶ 29.

in the legislature viewing it as within the police power of the sovereign, in the interest of maintaining the peace and good order of society, to provide this measure of protection to that class of officers who are willing to undertake that hazardous responsibility.

Zamora, 635 P.2d at 80 (footnotes omitted).

This unique role of a police officer has not changed and there is nothing to indicate that officers are subject to fewer frivolous actions now than they were sixty-five years ago. Indeed, the proliferation in litigation nationwide suggests the opposite. Indeed, this case is a classic example of the type of overzealous litigation that can result. Kendall has filed a smorgasbord of state law claims against five different officers and the City for the actions of those officers. As demonstrated by the motions currently on file with the United States District Court, most (if not all) of those claims are precluded and are also duplicative of Kendall's federal and state constitutional claims. The City Attorney's Office has spent time preparing motions to dispose of those claims, when a quick review of the law demonstrates these claims fall within the parameters of the Governmental Immunity Act of Utah and are excluded by the public duty doctrine. Requiring a bond serves the purpose of requiring a plaintiff and their attorney to appropriately research claims before bringing them and ensures the party defending against such claims is able to collect, at least in part, the attorneys' fees and costs they are entitled to receive by statute when they prevail on such claims.¹⁴

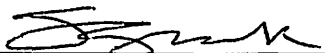
¹⁴ Notably, the United States District Court recently entered judgment for the City Defendants on all Kendall's federal law claims. This will be dispositive of most, if not all, Kendall's state law claims. See Dkt. 74, *Kendall v. Olsen et. al.*, United States District Court for the District of Utah, Case No. 2:15-cv-00862-RJS.

Kendall argues he has experienced delay and expense in this matter as a result of the bond and undertaking statutes. Claimed delay and expense do not show the statutes are no longer sound because of changing conditions. Moreover, any delay or additional expense Kendall experienced in this matter was a direct result of Kendall's decision to challenge the constitutionality of the bond and undertaking statutes in a separate action, rather than simply pursuing his claims against the City Defendants. Similarly, it is incorrect to claim that the statute results in gross injustices because claims are dismissed without being heard on the merits. When claims are dismissed for a failure to file a necessary bond or undertaking they are dismissed without prejudice.¹⁵ The plaintiff is free to re-file the claim with the necessary bond or undertaking.

CONCLUSION

The Court should decline to hear this appeal because the issue is moot and Kendall does not have standing to challenge the statutes at issue. Moreover, the statutes do not violate constitutional rights for the reasons set forth in the City Defendants' brief and the Court should not depart from the conclusion it reached in *Zamora* that the bond statute is constitutional on its face.

DATED this 21st day of February, 2017.



Attorney for Defendants/Appellees


¹⁵ See, e.g., *Rippstein v. City of Provo*, 929 F.2d 576, 578 (10th Cir. 1991) ("the appropriate remedy for failure to make a timely filing of an undertaking under section 63-30-19 is dismissal without prejudice."); *Mglej v. Garfield County*, No. 2:13-CV-713, 2014 WL 2967605, at *2 (D. Utah July 1, 2014) (stating "Utah case law is clear that undertakings and bonds must be filed contemporaneously with the filing of the complaint" and that "failure to post an undertaking and bond necessitates dismissal without prejudice").

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2017, a true and correct copy of **SUPPLEMENTAL BRIEF OF APPELLEES** was served, via U.S. Mail, postage pre-paid, to the following:

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A handwritten signature in dark ink, appearing to read "J. Davidson", is written over a horizontal line.

HB_ATTY-#59231